U.S. Department of Labor **Office of Administrative Law Judges**
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In the Matter of:	)	
	)	DATE: JULY 11, 2000
LOUIS GARITANO,	)	
Claimant,	)	CASE NO.'s 2000-LHC-58
	)	2000-LHC-59
vs.	)	2000-LHC-60
	)	2000-LHC-61
MARINE TERMINALS CORPORATION,	)	2000-LHC-62
Employer,	)	
	)	OWCP NO.'s 13-88002
and	)	13-97458
	)	13-97459
MAJESTIC INSURANCE CO.,	)	13-97460
Carrier.	)	13-97461
	)	

Appearances:

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For the Claimant

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For the Employer/Carrier

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER

Claimant Louis Garitano ("Claimant") filed a claim for benefits for hearing loss under the Longshore

and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"). A formal hearing was held in San Francisco, California, on March 3, 2000. All parties, except the Director of the Office of Workers' Compensation Programs ("OWCP"), were represented by counsel at the hearing, and the following exhibits were admitted into evidence during the hearing: Administrative Law Judge's Exhibits 1 through 3, ("ALJX-1," "ALJX-2" and "ALJX-3"),[1] Claimant's Exhibits ("CX") 1 through 6, and Employer/Carrier's Exhibits ("EX") 1 through 16. See Transcript ('Tr") at 6-9. Although counsel for the Director did not appear in person, he did submit a statement of position which contends that Employer is not entitled to relief under Section 8(f) of the Act. See ALJX-3. On May 16, 2000, counsel for both parties submitted Closing Briefs which were also made part of the record. See ALJX-4;[2] ALJX-5.[3]

Claimant argues that he filed a timely claim for compensation on February 26, 1996, as he did not become aware of his hearing loss and its relationship to his longshore employment until February 16, 1996. Claimant also contends that the hearing loss in his left ear was caused by exposure to deleterious noise levels while working for Employer Marine Terminals Corporation ("MTC" or "Employer"). Claimant seeks a scheduled compensation award based on a binaural loss of 79.3% under Section 8(c) (13) of the Act, necessary medical expenses pursuant to Section 7, penalties under Section 14(e) and interest accruing at the rate set forth in 28 U.S.C. § 1961.

Employer argues the Claimant's hearing loss was neither caused nor aggravated by his employment with MTC from November 1991 to the present. Employer further contends that to the extent that the Court should find any injury occurred to Claimant's hearing while employed at MTC, any such loss must be rated as a scheduled monaural loss. Employer also argues that Claimant did not file a timely claim for

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[1] Administrative Law Judge's Exhibits were Claimant's Pre-Trial Statement ("ALJX-1"), Employer/Carrier's Pre-Trial Statement ("ALJX-2") and Director's Notice of Appearance and Statement of Position ("ALJX-3"). Tr. at 8.

[2] "ALJX-4"- Claimant's Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law.

[3] "ALJX-5"- Employer/Carrier's Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law.

benefits. Finally, Employer asserts that if MTC is deemed to be the last responsible employer, it is entitled to Section 8(f) relief.

STIPULATIONS

The parties have agreed to the following stipulations:

1. The parties are subject to the Act;

2. Claimant and Employer Marine Terminals Corporation were in an employer-employee relationship at the time the injury occurred;

3. Employer filed a Notice of Controversion on November 1, 1996;

4. Claimant's average weekly wage at the time of injury was and continues at the present to be $1,461.24, for a maximum compensation rate of $782.44;

5. The date of maximum medical improvement is July 1, 1999;

6. Claimant continues to perform his regular pre-injury work without loss of earnings;

7. Employer/Carrier has not paid for any Section 7 medical services.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. See *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

ISSUES IN DISPUTE[4]

1. Whether Claimant's Notice of Claim for Compensation was untimely, and thus barred by the statute of limitations pursuant to Section 12 or 13 of the Act;

2. Whether Claimant's injury arose out of and in the course of his employment at MTC from November 1991 to the present;

[4] There was an issue regarding the last responsible employer; however prior to trial the Court issued an Order of Dismissal Without Prejudice on February 18, 2000, dismissing the other employers, other than Marine Terminals Corporation ("MTC"). Tr.4.

3. The nature and extent of the scheduled disability;

4. If Claimant prevails, whether Employer is responsible for payment of 14(e) penalties and interest, attorney's fees and costs, and medical services under Section 7;

5. Employer's entitlement to Section 8(f) relief.

SUMMARY OF EVIDENCE

Claimant's Background

Claimant Louis Garitano ("Claimant") was born in Texas on July 16, 1922. Tr.109. In 1940, Claimant graduated from high school, and thereafter began working on the waterfront as a scaler.[5] After serving three years in the United States Merchant Marines, Claimant returned to longshore work in 1947. Tr.112. Since 1947, Claimant has worked steadily on the docks as a longshoreman. *Id.* In 1955, Claimant joined the Longshore Union and began working as a clerk, wherein he was responsible for the unloading, receiving and delivering of cargo. Tr.114. Claimant testified that since 1955 he has been exposed to loud noises in the course of his employment as a longshoreman; however he did not recall any difficulty with his hearing during that time. Tr.115. He indicated that a significant amount of noise comes from working in close proximity to the mechanized equipment such as transtainers,[6] fork-lifts and diesel trucks, which usually run continuously during his shift Tr.117.

Claimant testified that when he began working for MTC in 1991, he still had the capacity to hear out of both ears, although the left ear was better than the right. Tr.114. Claimant's employment records indicate that he works five to six days a week, 10 to 12 hours a day. CX-3. While working with a transtainer at MTC's Seventh Street Terminal, Claimant explained that the noise is so loud he has to shout to co-workers who are only two to three feet away. Tr.123. Although he does wear hearing protectors

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[5] Claimant described a scaler as someone who does the work that the longshoremen do not want. Tr.111.

[6] Claimant explained that a transtainer is a large machine with four legs on rubber tires which moves cargo throughout the container yard. Tr.116.

at work, he must remove them in order to hear when people speak to him. Tr.125. Claimant indicated that the loudest noise he encounters on the yard is from the transtainers. Tr.126. He testified that his position deals exclusively with transtainers. Tr.126.

Claimant's Medical History

Although Claimant did not recall having any childhood medical problems with his ears (Tr. 127), Claimant's medical records from Kaiser Permanente Medical Group ("Kaiser") indicate that he has been treated since 1957 for recurring chronic ear infections in his right ear. EX-8, p.75. Claimant's first audiogram was performed on May 23, 1963. EX-8, p.83. Thereafter, Claimant underwent audiograms in March 1965 and December 1972. EX-8, pp.82,84. On August 16, 1973, Claimant underwent an exploratory surgery of the right middle ear and mastoid, which revealed chronic otitis media.[7] EX-8, p.75; EX-11, p.100. Dr. Fred Byl, who performed the August 1973 procedure, re-examined Claimant in January 1975 and reported an attic defect and chronic otitis media. EX-8, p.76. Additional audiograms were conducted on March 24, 1978 and December 12, 1984. EX-7, pp.50-51.

On December 12, 1985, another audiogram was performed, wherein Kaiser physician Dr. Keith Matsuoka reviewed the results and recommended hearing aids for Claimant. EX-7, p.66. Claimant testified that in 1986, doctors recommended that he obtain a hearing aid for his left ear and wear hearing protection while working around loud noises. Tr.135. On August 18, 1986, Dr. J.H. McConkie diagnosed a mastoid cavity infection in Claimant's right ear. Claimant returned to Dr. McConkie on December 29, 1987, and an audiogram was performed. Dr. McConkie reported a moderate-to-severe mixed hearing loss in the right ear with a large air bone gap and a mild-to-severe high-frequency sensorineural loss in the left ear. EX-7, pp.59-60.

Claimant underwent an audiogram in February and in November of 1990. The latter was

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[7] Otitis media is an inflammation of the middle ear. See *Dorland's Illustrated Medical Dictionary* 1204 (28th ed. 1994).

performed by Mary Helwig, a certified audiologist with a masters degree in audiology and a certified certificate of clinical audiology. EX-7, p.57; Tr.70. In her November 13, 1990 report, Helwig noted that Claimant's hearing in both ears continued to deteriorate, and that there was a significant decrease in speech discrimination in the right ear. EX-7, p.57. The audiogram documented a 68% right ear monaural loss and a 53% left ear monaural loss which equated to a 55.5% binaural rating.[8]

From May 25, 1993 to May 3, 1995, three audiograms were performed. Each test was administered by a certified audiologist, including a 1994 audiogram conducted by Mary Helwig. EX-7, pp.70-72. The May 3, 1995 audiogram documented a 52.5% loss of hearing in the left ear.[9] EX-7, p.72; Tr.73.

In 1996, Claimant was treated at Kaiser for another right-ear infection, and advised to seek counsel as his hearing loss was getting progressively worse. Tr.129. On March 28, 1996, Dr. Dale Tipton, a board-certified otolaryngologist, conducted a complete audiological evaluation of Claimant. CX-2. The examination included an audiogram which revealed a "profound mixed hearing loss on the right ear." The audiologist's report indicated hearing levels as follows: Right ear: 100 dB (500 Hz), 85 dB (1000 Hz), 70 dB (2000 Hz), 100 dB (3000 Hz). Left ear: 45 dB (500 Hz), 60 dB (1000 Hz), 60 dB (2000 Hz), 70 dB (3000 Hz). CX-2, p.32. Dr. Tipton diagnosed bilateral severe sensorineural hearing loss due to excessive noise exposure during the course of employment as a longshoreman and calculated a 50.5% left ear impairment and a 95.6% right ear impairment which equated to a 58.1% binaural rating. Claimant testified that Dr. Tipton's 1996 report was the first medical report he received which attributed his hearing loss to his transtainer position. Tr.128.

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[8] The Court found that the November 13,1990 audiogram was unreliable as it did not comply with the regulations. The test was unaccompanied by a confirmatory report and lacked the calibration notation. See pages 15-16, *infra*.

[9] The Court also found that the May 3, 1995 audiogram was unreliable as it failed to comply with the regulations. The test failed to indicate the calibration date and was performed on the same day that Claimant had worked an 11-hour shift. See pages 15-16, *infra*.

On behalf of Employer and Carrier, Dr. William Boyle evaluated Claimant on November 27, 1996. Dr. Boyle is a board-certified otolaryngologist, who has been licensed to practice medicine in California since 1957. EX-9, p.92. During the November 1996 visit, Dr. Boyle examined Claimant's ear, nose and throat. EX-11, p.98. An audiogram was also performed by audiologist Martha Todebush, M.A., CCC-A.[10] EX-11, pp.104-106. The audiometric evaluation revealed a mixed hearing loss in the right ear (84% monaural loss) and a sensorineural hearing loss in left ear (52.5% monaural loss) which equated to a 57.8% binaural hearing loss. EX-11, pp.102, 106. Dr. Boyle also noted that Claimant's "sensorineural component of the hearing loss in both ears is due to the cumulative effects of industrial noise exposure." He further reported that 20% of Claimant's binaural hearing loss is due to non-industrial factors, and 80% of the loss is directly related to unprotected noise exposure during his career as a longshoreman. EX-11, p.102.

On October 1, 1997, Dr. Boyle prepared a supplemental report on Claimant's hearing loss. EX-12. He concluded that based on the results of Claimant's audiograms[11] performed during his employment with MTC and the fact that Claimant's job as a dock supervisor was mainly an office position, Claimant was not working in areas where there was noise exposure of a duration and intensity that might have caused a progression is his already existing hearing loss. Tr.91,97. He further opined that Claimant's hearing loss was due to the effects of aging. EX-12, p.108.

Dr. Boyle testified that Claimant's hearing loss between 1991 and 1999 was not due to exposure to deleterious noise levels in the workplace based on his review of the September 19, 1997 Noise Level

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[10] "M.A."- masters of audiology; "CCC-A" - certified certificate of clinical audiology.

[11] Dr. Boyle relies on the following audiograms:
November 27, 1996: 52.5% left - 84% right - 57.8% binaural rating,
May 3, 1995: 52.5% left - 86.2% right - 58% binaural rating,
November 13, 1990: 53% left - 68% right - 55.5% binaural rating. See Tr.91; EX-12, p.108.

Survey ("Noise Survey") (EX-13).[12] Tr.85. Dr. Boyle testified that noise does not become unsafe until it exceeds 90dB over an eight-hour period. Tr.86. He acknowledged that if the noise level is such that one has to shout to be heard by someone standing three to four feet away, exposure to a such noise for over an eight-hour period could be damaging to one's hearing. Tr.101. Dr. Boyle indicated that Claimant's right ear problems were the main contributor to his binaural decline between 1990 and 1996. Tr.105. He explained that the diminution in hearing attributable to noise exposure manifests as a slow progression, and therefore Claimant's hearing loss between 1996 and 1999 was not related to noise exposure. Tr.106.

On cross-examination, Dr. Boyle conceded that he did not know what caused the progression of Claimant's hearing loss in his left ear, only that it was not due to noise exposure. Tr.107.

On July 1, 1999, Claimant was examined by Dr. David Schindler. Dr. Schindler is a board-certified otolaryngologist. CX-1; Tr.27. In addition to an ear, nose and throat evaluation, Claimant also underwent an audiogram that was performed by Larry Eng, M.S., CCC-A.[13] The audiologist's report noted the following hearing levels: Right ear: 100 dB (500 Hz), 100 dB (1000 Hz), 100 dB (2000 Hz), 100 dB (3000 Hz). Left ear: 70 dB (500 Hz), 75 dB (1000 Hz), 80 dB (2000 Hz), 75 dB (3000 Hz). CX-1, p.21. Dr. Schindler opined that the July audiogram documented a 100% right-ear rating and a 75% left-ear rating which equated to a 79.3% binaural loss. Tr.45-47. In his report dated August 4, 1999, Dr. Schindler stated that the audiogram revealed essentially no hearing in the right ear and a severe-to-profound high-frequency hearing loss in the left ear. CX-1, p.10. Dr. Schindler also considered the 1997 Noise Survey which indicated that the noise level for a transtainer clerk averages 82 to 85 dBA.[14] Although the

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[12] The Noise Survey documented the Time-Weighted-Average sound levels to be 82 to 83 dBA for the transtainer clerk during the 3.33 hour test. EX-13, p.115.

[13] Dr. Schindler indicated that the audiometer was a Beltone 2,000 which was calibrated by the Electro Acoustic Company on January 11, 1999. CX-1, p.10.

[14] Dr. Schindler noted that by relying on the 1997 Noise Survey, one has to make the assumption that this is representative of the noise exposure Claimant encountered as a transtainer clerk. CX-1, p.17.

noise levels documented in the Noise Survey are unlikely to cause noise-induced hearing loss, Dr. Schindler did note that a small percentage of patients exposed to this level of noise may develop a small hearing loss, thus Claimant's hearing loss in his left ear could be the result of hazardous noise levels. CX-1, pp.17-18. He further noted that the progressive decrease in the right ear is the result of chronic ear infections and chronic mastoiditis, rather than from injurious noise levels. CX-1, p.17. At trial, Dr. Schindler opined that one is most likely in the presence of excessive noise if that person must shout to be heard by another standing three to four feet away.[15] Tr.30.

Dr. Schindler concluded that based on Claimant's medical records, audiometric testing and physical examination, Claimant suffers from a "mixed" loss, which means a combination of factors account for the decline,[16] consisting of both neurosensory[17] and conductive components.[18] Tr.50. Dr. Schindler indicated that to a reasonable degree of medical certainty, Claimant has sustained a noise-induced hearing loss in the left ear arising from his past eight years of employment with Employer. Tr.52.

LEGAL ANALYSIS

Timeliness

Employer argues that Claimant failed to file a timely notice and claim pursuant to Sections 12 and 13 of the Act. Employer contends that Claimant knew or should have known that his exposure to

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[15] Dr. Boyle confirmed Dr. Schindler's opinion in his own testimony. Tr.101.

[16] In addition to deleterious noise levels, factors such as aging (presbycusis) and undiagnosed metabolic conditions, are also implicated in Claimant's hearing loss. Tr.50.

[17] Dr. Schindler explained that "neurosensory hearing loss"occurs when the hair cells in the inner ear (cochlea) are damaged by excessive noise, and thus unable to transport sound to the nerve which goes to the brain to create sound. Tr.33.

[18] Dr. Schindler explained that "conductive hearing loss" refers to problems with the mechanical transmission of sound from the eardrum to the cochlea, which can be caused by things such as trauma, infection and damage to the eardrum. Tr.36-37.

excessive levels of noise was responsible for his ongoing hearing loss prior to filing his February 26, 1996 claim. EX-16, p.130.

Section 12(a) of the Act provides that a claimant must give notice of an injury or death for which compensation is payable within thirty (30) days after injury or death, or within thirty (30) days after the employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. See 33 U.S.C. § 912(a). For hearing loss claims, the date of injury is determined by the date the employee receives an audiogram, with a report indicating that the employee suffered a loss of hearing that is related to employment. 33 U.S.C. § 908(c)(13)(D); 20 C.F.R. § 702.212(a)(3).

Claimant asserts that he first became aware of the connection between his longshore employment and his hearing loss on February 16, 1996, when his doctor advised him that his hearing was deteriorating and that he should seek counsel. Tr.129. Claimant testified that he did not receive an audiogram with an "accompanying report" until Dr. Tipton furnished such documents on April 28, 1996. Tr.129. Dr. Tipton's report specifically attributed Claimant's "bilateral severe sensorineural hearing loss to excessive noise exposure during the course of his employment as a longshoreman." CX-2, p.32. Therefore, Claimant contends that his February 26, 1996 notice and claim for compensation were timely filed.

Employer argues that the audiograms performed prior to Claimant's employment with MTC, including the two taken in 1993 and 1994, "document an awareness of noise-induced hearing loss, yet no timely notice was provided to employer." EX-16, pp.130-31. The Court acknowledges the May 3, 1995 audiogram notation "Dr. McConkie feels hearing is getting worse [sic] - lots of trouble at work, noisy environment." EX-6, p.44. However, this statement does not expressly indicate the relationship between Claimant's hearing loss and his longshore employment, nor is there any evidence that Dr. McConkie discussed the audiogram results and causation with Claimant on the date of the exam. Assuming *arguendo*, that Claimant was aware of the results and causation determination, Employer's contention still fails as there is no evidence that Claimant received the audiogram and accompanying report more than thirty days prior

to filing his February 1996 claim. As previously stated, the regulations explicitly provide that the date of injury coincides with the date employee receives the audiogram and accompanying report documenting the relatedness of employment to the hearing loss. In the instant case, the statute of limitations pursuant to Sections 12 and 13 of the Act did not start running until April 28, 1996, the date Claimant received Dr. Tipton's audiogram and report. Since Claimant filed his claim for compensation on February 26, 1996, approximately 10 days after a Kaiser physician advised Claimant to seek counsel regarding his hearing loss, and 2 months before his receipt of the audiogram and report, the Court finds Claimant's filing was timely pursuant to Sections 12 and 13 of the Act.

Section 20(a) Presumption

An injury compensable under the Act must arise out of and in the course of employment. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, absent substantial evidence to the contrary, that the claim comes within the provisions of the Act." 33 U.S.C. § 920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers,* 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain. *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). This statutory presumption reflects the "humanitarian policy underlying the Act," and "requires resolution of all doubtful questions of fact in favor of the injured employee." *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1328 (9th Cir.1980). The Board has applied the presumption to require that a "claimant need only show that employee sustained physical harm and that conditions existed at work which could have caused the harm." *Suseoff v. San Francisco Stevedoring Co.*, 19 BRBS. 149, 151 (1986).

With respect to the first requirement, the Court finds that Claimant has established that he has suffered harm for Section 20(a) purposes as neither party disputes that Claimant suffers from a profound hearing loss.[19]

[19] Employer states that it is "undisputed that the claimant suffers from a profound hearing loss." See ALJX-5, p.4.

Next, Claimant must show that he was exposed to potential deleterious noise levels during his work activities. However, to invoke the Section 20(a) presumption, Claimant need not establish actual levels of noise in the workplace. In *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998), the Ninth Circuit held that a claimant's uncontradicted testimony that conditions existed at work that could have caused the harm is sufficient to invoke the presumption of Section 20(a). In the instant case, Claimant testified convincingly that he has been routinely exposed to loud noises while working as a transtainer clerk. He described the types of noises he encounters while working for Employer: noise from transtainer engines, truck traffic, the running of diesel engines, discharging of cargo, the acceleration of top-pick[20] and side-pick[21] engines, and the loading of containers onto trailers. Claimant does wear ear protection while working; however he needs to remove the muffs to communicate with the transtainer operators. He further stated that the level of noise is so high that he must shout to be heard by someone who is only three to four feet away. Tr. 117-123.

Claimant's expert, Dr. Schindler, testified that to a reasonable degree of medical certainty Claimant has suffered a noise-induced hearing loss during his work activities over the last eight years at his present employer. Tr.52; CX-1, p.18. Dr. Schindler disagreed with Dr. Boyle's October 1997 supplemental report which indicated that the progression of Claimant's hearing loss from November 1991 to November 27, 1996,[22] was not due to industrial noise exposure. Tr.57.

In sum, the undersigned finds that Claimant has established a *prima facie* case under Section 20(a) that his hearing loss was caused by longshore employment with MTC. See, e.g., *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998) (section 20(a) presumption invoked where claimant testified that he was exposed to loud noise from machinery and some medical evidence indicated that claimant's hearing loss was noise induced).

Having found sufficient evidence to invoke the Section 20(a) presumption, the burden shifts to Employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981).

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[20] Claimant described a "top-pick" as a very large fork-lift that distributes the containers around the yard. Tr.120.

[21] Claimant described a "side-pick" as a smaller version of the top-pick that is used to pick up empty containers, which is just as noisy as the top-picks. Tr.121.

[22] Claimant was initially examined by Dr. Boyle on November 27, 1996.

Employer does not dispute that Claimant has sustained a severe hearing loss; rather it argues that Claimant's hearing loss was neither caused nor aggravated by his employment with Employer from November 1991 to the present. Employer contends that the noise levels to which Claimant was exposed while employed by MTC were not deleterious based on the 1997 Noise Survey. See EX-13.

On December 4, 1997, Mr. Steve Pettyjohn, a certified acoustic engineer, prepared a noise survey on behalf of Employer. EX-13. The actual survey was conducted on September 19, 1997, during the morning shift at Employer's 7th Street Terminal. For a 3.3 hour-period, a single transtainer clerk was tested while working at an RTG (rubber tired gantry) "with the motor on the side opposite where the tractor and trailer pull the transtainer." EX-13, p.114. The survey revealed that the transtainer clerk is exposed to varying sound levels because the distance between the major sound sources changes, and that the transtainer and trailer are the major sound sources to which the clerk is exposed. EX-13, pp. 112-13. The Time-Weighted-Average ("TWA") sound level exposure for the transtainer clerk under the scenarios tested yielded less than 85 dBA for an eight-hour day. The Occupational Safety and Health Administration ("OSHA") average sound level was 82 dBA during the test period. EX-13, p.112. Mr. Pettyjohn opined that given the time away from the transtainer, even for a clerk positioned on the engine side, it is unlikely that the average OSHA sound level would reach 85 dBA. He concluded that under normal conditions, no hearing loss would be expected. EX-13, p.115.

The undersigned finds that the Noise Survey is not sufficient to rebut the presumption that Claimant was exposed to harmful noise. The study measured noise for a 3.3-hour period, and calculated the TWA based on an eight-hour day. However, Claimant's testimony and his daily work records indicate that he generally worked between 10 to 12 hours per day. Tr.188; EX-3. Therefore, the OSHA standards, based on an eight-hour day, are not an accurate estimate of Claimant's daily noise-level exposure. Furthermore, the Noise Survey lacks sufficient evidence that the test conditions were representative of the noise Claimant has been exposed to as a transtainer clerk. The Noise Survey does not specify the nature of the work in which the monitored clerk was engaged. Claimant testified that noise from a transtainer's engine will increase based on the weight of the containers it is moving (Tr.118), and that when a top-pick is located right next to a transtainer it is very difficult to hear. Tr.124.[23] Moreover, there is no reference to the noise generated by the top-pick or side-pick engines, or how much time the clerk spent outside in the yard versus inside the office. Therefore, the Noise Survey is insufficient evidence to rebut Claimant's presumption.

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[23] Claimant testified that in addition to the transtainer's engine running continuously during his shift, the engine becomes louder as it generates power to lift the containers. Tr.118.

Next, Employer offers the testimony of Dr. Boyle. Upon review of the audiograms taken November 13, 1990, May 3, 1995 and November 27, 1996, which all reported similar left-sided monaural ratings, Dr. Boyle concluded that Claimant had not sustained any injury to his left ear due to cumulative noise exposure since he began working for Employer in 1991. Tr.106. He testified, and Dr. Schindler concurred, that cumulative noise exposure typically causes a slow, progressive increase in hearing loss. Dr. Boyle noted that prior to the deterioration of Claimant's hearing between 1996 and 1999, there was virtually no progression of hearing loss in Claimant's left ear from 1991 to 1996. Tr.106. In his report dated October 1, 1997, Dr. Boyle indicated that Claimant was not working "in areas where there was noise exposure of a duration and intensity that might have caused a progression in his already existing hearing loss." EX-12, p.108. In sum, Dr. Boyle testified that while something in Claimant's left ear was causing the hearing loss, he could certainly rule out noise exposure as a cause as there was no progression of hearing loss in the left ear between November 1990 and November 1996. Tr.107.

The Court finds Employer has met its burden of rebuttal as it has presented substantial evidence that the progression of Claimant's hearing loss since 1991 was not caused by industrial noise exposure. Dr. Boyle's opinion is based on the audiometric test patterns and the Noise Survey. Although Dr. Boyle cannot explain the actual cause of Claimant's latest hearing loss progression, he did testify that he was certain that Claimant's condition was not a result of exposure to deleterious noise levels.

Weighing the Evidence

If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corporation,* 14 BRBS 927 (1982). The ultimate burden of proof then rests upon the claimant. See *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994); see also *Holmes v. Universal Maritime Services Corporation,* 29 BRBS 18, 21 (1995).

Having found that the Section 20(a) presumption has been rebutted, the Court must now determine whether Claimant has fulfilled his burden to show that his left-sided hearing loss has been aggravated or caused by his employment with MTC since November 1991.

Drs. Schindler, Tipton and Boyle all agree that Claimant has suffered a neurosensory hearing loss in his left ear which was, at least partially, aggravated by his exposure to deleterious noise levels while working as a longshoreman. Drs. Schindler and Boyle also concur that Claimant did not sustain a right-sided hearing loss during his employment at MTC. Both doctors attribute Claimant's right ear hearing loss

to a chronic infection which acted like an earplug and reduced that ear's exposure to excessive noise. However, Dr. Boyle concluded that Claimant had not sustained any injury to his left ear due to cumulative noise exposure since he began working for Employer in November of 1991.

While Drs. Boyle and Schindler are both board-certified otolaryngologists with impressive credentials, the Court finds that Dr. Schindler's opinion is more credible. Although Dr. Boyle has been practicing otolaryngology for almost forty years, his qualifications do not reflect a strong background in occupational hearing loss. See EX-9. In addition to his thirty years of experience as a clinical professor of otolaryngology, Dr. Schindler has published material[24] and conducted several lectures addressing occupational hearing loss.[25] See EX-1.

The Court also notes the deficiencies in Dr. Boyle's assessment. He formulated an opinion based on Claimant's audiometric test results, as well as the noise-level data obtained by the Noise Survey. With respect to the former, Dr. Boyle concluded that since the November 13, 1990, May 3, 1995 and November 27, 1996 audiograms all documented a 52.5% left ear hearing loss, Claimant's results did not reflect the slow, progressive pattern characteristically attributed to noise-induced hearing loss, and thus Claimant had not sustained any injury due to industrial noise since 1991. Tr.105. The strength of Dr. Boyle's opinion rests on the reliability of the aforementioned audiograms. Section 908(c)(13)(E) of the Act requires that "determinations of loss of hearing shall be made in accordance with the Guides for the Evaluation of Permanent Impairment as promulgated and modified from time to time by the American Medical Association." In addition, the administration of the audiogram should comport with the requirements set forth in the applicable regulations. See 20 C.F.R. § 702.441. Section 702.441, provides:

> (1) the audiogram must be administered by a licensed or certified audiologist, a board-certified physician, or other qualified individual; (2) the audiogram must be accompanied by the report of a licensed audiologist or otolaryngologist which sets forth the testing standards used and describes the method of evaluating the hearing loss, and provides an evaluation of the reliability of the test results; (3) the audiogram and accompanying report must be provided to the employee at the time of administration or within 30 days thereafter; (4) no contrary audiogram of equal probative value conducted at the same time[26] may be produced; (5) evaluators must determine the loss of hearing

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[24] See, e.g., David Schindler, M.D., Robert K. Jackler, M.D., and Scott T. Robinson, M.P.H., C.I.H., C.S.P., "Hearing Loss," *in Occupational and Environmental Medicine*, 123-38 (Joseph LaDou ed., Appleton & Lange 1997).

[25] See, e.g., Schindler, David."Noise-Induced Hearing Loss: Occupational Medicine Grand Rounds." Guest Lecture. University of California, Davis. 1999.

[26] Section 702.441 states that "same time" means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue.

> by using criteria pursuant to the most recent edition of the *AMA Guides*; and (6) the audiometer must be calibrated according to current American National Standard Specifications for Audiometers and procedures set forth at 29 C.F.R. § 1910.95.

20 C.F.R.§ 702.441(b)-(d).

The Court questions the reliability of the audiograms dated November 13, 1990 and May 3, 1995. Turning to the former, the Court notes the absence of a report certifying the audiogram's results and the calibration date of the audiometer. In addition, Claimant's records reveal a previous audiogram on February 7, 1990 which yielded only a 39.4% left ear monaural rating. CX-3, p.68. Although the February audiogram also lacks the confirmatory report and calibration notation, it does call into question the accuracy of the November test which documented a 52% left ear hearing impairment and also failed to comply with all of the regulations' provisions.

Results from the May 3, 1995 audiogram are also suspect as Claimant's work records reveal that he worked an eleven-hour shift on the day this test was administered. CX-3, p.82. Dr. Schindler testified that a "temporary threshold shift"[27] could affect the accuracy of the audiograms, and therefore the "rule of thumb" is not to administer an audiogram until the patient has been away from work for at least fourteen hours. Tr.51. Moreover, Dr. Schindler was reluctant to endorse the May 1995 audiogram as an accurate reflection of Claimant's hearing loss as it did not indicate the calibration date. Tr.71. Considering the "temporary threshold shift" condition described by Drs. Boyle and Schindler (Tr.99,52), coupled with the lack of additional evidence to substantiate the validity of this test, the Court is not persuaded that the 52.5% left ear impairment result is truly indicative of Claimant's hearing loss as of May 3, 1995.

Having discounted the reliability of the 1990 and 1995 audiograms, Dr. Boyle's reliance on the Noise Survey must be addressed. Dr. Boyle testified that "there was no indication of noise levels that would have caused any progression of [Claimant's] hearing loss." Tr.85. He further stated "and if that [Noise Survey] is true, then it is my opinion that the progression of the hearing loss in the patient's left ear was not related to industrial noise exposure during that time when he was working for Marine Terminals beginning in November of 1991." Tr.85. Since the Court has already determined that the Noise Survey

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20 C.F.R. § 702.441(b)(3).

[27] Dr. Schindler testified that a "temporary threshold shift" occurs when excessive noise levels create a temporary condition of noise-induced hearing loss. This condition usually disappears three to four hours after the high-level noise exposure has ended. Tr.51-52.

results are not an accurate representation of Claimant's work-related noise exposure[28] at MTC, Dr. Boyle's reliance on such evidence is misplaced.

The undersigned also notes the inconsistencies in Dr. Boyle's reports. In his February 3, 1997 report, Dr. Boyle noted that Claimant's employment at MTC entailed working on the docks and exposure to noise from the operation of the equipment. Dr. Boyle recommended that Claimant should wear ear protection "on a regular basis when there might be exposure to loud noise potentially injurious to hearing acuity." EX-11, p.99,102. However, in his October 1, 1997 report, Dr. Boyle described Claimant's supervisory position as primarily clerical work, with occasional time outside on the docks. EX-12, p.108. This revised impression raises some concern as the Noise Survey was not prepared until December 1997, and Dr. Boyle's report is dated October 1997. There is no evidence that he received a copy of the survey prior to Mr. Pettyjohn's report; thus the Court questions Dr. Boyle's revision of his description of Claimant's work activity. Also, Dr. Boyle's February report noted that Claimant had been wearing ear protection on a fairly regular basis for the past five years, which suggests that Claimant must have been exposed to high levels of noise on a regular basis during that time. However, Dr. Boyle's October report stated that Claimant was not working in areas of excessive noise since he began his employment with MTC. EX-12, p.108.

In contrast, Dr. Schindler's opinion is well-reasoned and supported by the evidence. His assessment considers several factors: the audiometric patterns, progression of the hearing loss, effects of presbycusis, Claimant's testimony, and the Noise Survey. Upon reviewing Claimant's audiograms from 1965 through 1999, Dr. Schindler concluded that there was a progression of noise-induced hearing loss. Tr.49,71. He characterized Claimant's condition as a "mixed hearing loss," which is hearing loss due to noise exposure combined with presbycusis and other metabolic factors. Tr.50. He also testified that while presbycusis can account for a percentage of the hearing loss, the audiograms reveal a progression that exceeds what would have been expected by the aging process. Tr.51. Employer did not submit any evidence to rebut Dr. Schindler's opinion regarding the effects of presbycusis. Dr. Schindler further testified that to a reasonable degree of medical certainty, Claimant had suffered a noise-induced hearing loss in his left ear during his work activities since 1991. Tr.52.

Moreover, Dr. Schindler's opinion is consistent with Claimant's recitation of his exposure to noise at MTC, and is also corroborated by Employer's expert, Dr. Boyle, who conceded that if a person must shout to be heard by someone only three feet away, that person is in the presence of deleterious noise. Tr.101. Dr. Schindler also testified that although the noise levels documented in the Noise Survey were

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[28] See pages 12-13, *supra.*

not likely to cause a noise-induced hearing loss, a small percentage of patients exposed to such levels may develop a small hearing loss. Therefore, even assuming the Noise Survey was accurate, it would still be medically possible for Claimant to sustain damage. Based on the foregoing, the weight of the medical evidence supports the conclusion that Claimant's employment at MTC has contributed to his noise-induced hearing loss.

Aggravation Rule

As the weight of the evidence supports the finding that Claimant's exposure to industrial noise during his employment with MTC has contributed to hearing loss in his left ear, the Court need not address whether Claimant's right-sided hearing loss is also attributable to work-related acoustic trauma. The "aggravation rule" provides that where an employment injury aggravates, accelerates or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. See *Port of Portland v. Director, OWCP (Ronne),* 932 F.2d 836 (9th Cir. 1991) (citing *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15, (9th Cir. 1966)). The Ninth Circuit has held that this doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying impairment. See *Port of Portland,* 932 F.2d at 839 (citing *Independent Stevedore Co.*, 357 F.2d at 815). The *Port of Portland* court further opined that if a claimant's disability is partially related to "a non-employment condition, he is not required to prove that his disabilities combined in more than an additive way to warrant compensation for the resulting overall impairment." *Id.* (citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 516 n.5 (5th Cir. 1986)); *Newport News Shipbuilding and Dry Dock Co. v. Fishel*, 694 F.2d 327, 328-29 (4th Cir. 1982) (claimant awarded full 31.25% hearing loss without need to determine whether 5.95% current work-related loss worsened or affected pre-employment 25.3% loss).

Claimant asserts that he has sustained a noise-induced hearing loss in his left ear while in the employ of MTC, and therefore, is entitled to compensation for his entire binaural hearing loss. Employer argues that based on the "rational connection" rule, if Claimant is entitled to compensation for his hearing impairment, it should be limited to an award for a left-sided monaural loss. Employer further contends that since it was "theoretically impossible" for Claimant's work activities after 1972 to have contributed to his right-sided hearing loss, there is "simply no rational connection between Claimant's employment with MTC and his right-sided hearing deficit." See ALJX-5, p.14. Employer's argument is without merit as the "rational connection" rule is not used to limit the extent of liability, but rather to determine if an employer incurs any liability, thus qualifying as the "last responsible employer," and liable for claimant's entire

disability. *Port of Portland,* 932 F.2d at 840.[29]

In the instant case, the parties agree that Claimant has been incapable of sustaining any noise-induced hearing loss in his right ear since 1972 and that Claimant has a 100% monaural rating in his right ear. With respect to his left ear, Dr. Schindler opined, and the Court agrees, that Claimant has been exposed to deleterious noise levels while working for MTC. Since Claimant's industrial injury when combined with his non-employment disability accounts for a greater degree of impairment than that which would have occurred form the work-related injury alone, Employer is liable for Claimant's entire hearing loss. The undersigned also notes that while it is undisputed that a percentage of Claimant's left ear hearing loss is attributable to presbycusis, Employer is not permitted to reduce its liability based on the effects of the aging process. *Port of Portland,* 932 F.2d at 84. Based on the foregoing, Claimant is entitled to compensation for his entire binaural hearing loss.

Extent of Hearing Loss

Claimant has the initial burden of proving the nature and extent of disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 755 F.2d 428, 17 BRBS 56 (9th Cir. 1982). A residual disability is considered permanent when the employee's condition reaches the point of maximum medical improvement. *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (9th Cir. 1990). The parties have stipulated that Claimant reached maximum medical improvement on July 1, 1999. Accordingly, the Court finds that Claimant's disability became permanent on that date.

The Act provides that determinations of hearing loss shall be made in accordance with the American Medical Association *Guides for the Evaluation of Permanent Impairment* ("*AMA Guides*"), 33 U.S.C. § 908(c)(13)(E). An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof if it was conducted pursuant to 20 C.F.R. § 702.441 (b)-(d).[30]

Claimant contends that the July 1, 1999 audiogram indicates his hearing loss equates to a 79.3% binaural rating. The audiometric evaluation was conducted by a certified audiologist, Larry Eng, MS-

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[29] In *Port of Portland,* the court discussed the "rational connection" rule in the context of determining the last responsible employer. The court cited to the leading case on this doctrine, *Traveler's Insurance Co. v. Cardillo,* 225 F.2d 137 (2nd Cir.), *cert. denied,* 350 U.S. 913, 76 S.Ct. 196 (1955) (the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date on which Claimant became aware that his occupational disease was linked to his work-related activities, should be liable for the full amount of a compensation award).

[30] See pages 15-16, *supra.*

CCC-A, and the audiometer was calibrated on January 11, 1999. The audiologist's report indicated hearing levels as follows: Right ear: 100 dB (500 Hz), 100 dB (1000 Hz), 100 dB (2000 Hz), 100 dB (3000 Hz). Left ear: 70 dB (500 Hz), 75 dB (1000 Hz), 80 dB (2000 Hz), 75 dB (3000 Hz), and contained a notation that Claimant had "no noise exposure in the last 24 hours." CX-1, p.19. In his August 4, 1999 report, Dr. Schindler discussed the methods employed during this audiometric testing, namely bone conduction, air conduction, speech reception threshold and speech discrimination. CX-1, p.10. He also determined the extent of Claimant's hearing loss based on the *AMA Guides*. At trial, Dr. Schindler testified to the validity of the July 1999 evaluation (Tr.43) and Employer's expert, Dr. Boyle, concurred with the accuracy of this audiogram (Tr.88). For these reasons, the undersigned finds that the July 1, 1999 audiogram substantially complies with the regulations and is sufficient to invoke the presumption as to the extent of Claimant's hearing loss. In addition to satisfying the presumption, the Court further holds that the July 1999 audiogram is reliable. There is no evidence that Claimant did not cooperate during the testing, and Dr. Schindler noted in his 1999 report that the results of the tympanometry[31] were consistent with the examination findings and audiogram results. In addition, the audiologist reported that Claimant was not exposed to noise within twenty-four hours of the test.

The Court also considered the audiograms of March 28, 1996 and November 26, 1996. With respect to the former, Dr. Tipton indicated that Claimant had a 58.1% binaural hearing loss. The audiogram appears to be reliable as it was performed by a registered audiologist at least fourteen hours after Claimant had been away from industrial noise,[32] contained the required calibration notation and was accompanied by Dr. Tipton's report. CX-2, p.31. Moreover, this audiometric test yielded results that were consistent with Dr. Boyle's November 27, 1996 audiogram which documented a 57.8% binaural rating. Likewise, the undersigned finds that the November 1996 test was conducted in accordance with the regulations and is a reliable indicator of Claimant's hearing loss.[33]

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[31] A test which measures the function of the middle ear by varying the pressures within the ear canal. This test measures the movement function of the tympanic membrane. See *Dorland's Illustrated Medical Dictionary* 1767 (28th ed. 1994).

[32] Although the actual time of the audiogram is not listed, the Court has inferred that 14 hours had elapsed between Claimant's last exposure to industrial noise and the audiogram as Claimant stated he typically ends work at 5:30 p.m. (Tr.117). Therefore, the March 28, 1996 audiogram needed only to be performed after 7:30 a.m. to avoid the issue of "temporary threshold shift."

[33] Reliability of the November 1996 audiogram is based on the following: (1) it was conducted by a certified audiologist, Martha Todebush, M.A., CCC-A; (2) the audiometer was calibrated to ANSI standards on August 2, 1996; (3) the testing methods described included air conduction, bone conduction, speech discrimination and speech threshold, and acoustic reflex testing; (4) the audiologist reported a

Although all three of the audiograms in question are credible, the Court elects to follow the July 1999 audiogram as this test reveals the most recent audiometric data on the extent of Claimant's hearing loss. In addition to complying with the regulations, Employer also relied on this test to support its Section 8(f) argument. Based on the foregoing, the Court finds that the 79.3% binaural rating documented in the July 1999 audiogram accurately reflects the extent of Clamant's current hearing loss.

Section 8(f)

On May 28, 1997, Majestic Insurance Company, on behalf of Marine Terminals Corporation, (hereafter jointly referred to as "Employer"), filed an application for Section 8(f) relief. EX-4, p.36. Thereafter, the District Director ("Director") denied Employer's application as it did not contain an audiogram prior to the date of injury. The Director also stated that if the case comes before the Office of Administrative Law Judges, she would not recommend that the Solicitor assert the Absolute Defense. EX-5, p.41. On September 24, 1997, Employer's counsel, Mr. James Finnegan, submitted a Notice of Representation and a Supplemental Application for Section 8(f) Relief and enclosed several audiograms documenting Claimant's pre-existing hearing loss. EX-6, p.42. In a letter dated November 5, 1997, the Department of Labor notified Employer that the absolute bar would not be asserted in response to the September 1997 supplemental application for Section 8(f) relief. EX-10, p.97.

On February 28, 2000, the Director filed an Amended Notice of Appearance, Request for Service and Statement of Position ("Statement"). The Director stated that Employer's application for Section 8(f) Special Fund relief was "deficient in failing to satisfy the *AMA Guides* and the requirements of the applicable regulations, in particular the audiograms were either unaccompanied by medical reports or accompanied by reports that failed to comply with the regulations.[34] ALJX-3. In its Proposed Findings, Employer argues that it has satisfied the requirements for receiving Section 8(f) relief. See ALJX-5, p.15.

Section 44 of the Act shifts the liability from employer to the Special Fund to pay compensation for permanent disability or death after 104 weeks. See 33 U.S.C. § 908(f). The regulations require that a request for Section 8(f) relief be made as soon as permanency of claimant's condition is known or is an issue in dispute. See 20 C.F.R. § 702.321(b)(1). Pursuant to Section 8(f)(3), failure to submit a timely

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reliability rating of "good;" (5) the audiogram was accompanied by Dr. Boyle's confirmatory report; and (6) Claimant's work records indicate that he had not been exposed to industrial noise within 24 hours prior to the test.

[34] See 20 C.F.R. § 702.441(d) and 20 C.F.R. § 702.321(a).

and fully documented application shall be an absolute defense to the liability of the Special Fund. The Section 8(f)(3) bar is an affirmative defense that must be raised and pleaded by the Director. 20 C.F.R. § 702.321(b)(3).

In the case at bar, the evidence clearly reflects the Director's intention not to assert the Section 8(f)(3) absolute defense. Having found that the absolute bar does not apply, the undersigned may now consider the merits of Employer's Section 8(f) request. See *Tennant v. General Dynamics Corp. et al.*, 26 BRBS 103 (1992).

In order to obtain relief under Section 8(f), the employer must show: (1) that the claimant had an existing permanent partial disability prior to the last injury; (2) that the disability was manifest to the employer prior to the last injury; and (3) that the current disability is not due solely to the most recent injury. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974, (9th Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 726 (1982). In hearing loss claims, a pre-existing hearing loss must be documented by an audiogram which complies with the requirements of 20 C.F.R. § 702.441. 20 C.F.R. § 702.321(a)(1).

The Court finds that the evidence in the instant case clearly shows that Employer has satisfied the three initial requirements for Section 8(f) relief. The record contains several medical reports documenting the progression of Claimant's hearing loss from 1965 to the present. Drs. Boyle and Schindler both reported that audiometric evaluations as early as 1970 have revealed Claimant's binaural hearing loss. The May 1995 audiogram documenting a 58% binaural hearing loss, established that Claimant had a pre-existing permanent partial disability and that the disability was manifest to Employer. See *Director, OWCP, v. General Dynamics Corp.*, 980 F.2d 74, 80-83 (1st Cir. 1992) (pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury). In addition, Dr. Schindler's audiogram of July 1999 revealing a 79.3% binaural hearing loss, shows that Claimant has a materially and substantially greater hearing impairment than he did in 1995, and that the deterioration is at least partially attributable to his employment at MTC.

The Director contends that Employer's application for relief must be denied. The Director asserts that the audiograms upon which Employer relies as evidence of Claimant's pre-existing hearing loss are not credible evidence because they do not comply with the requirements of 20 C.F.R. § 702.441.[35] In particular, the Director asserts that Employer's submission of audiograms were either "unaccompanied by medical reports or accompanied by medical reports failing to satisfy the requirements of the regulations."

[35] See pages 15-16, *supra*.

ALJX-3.[36] In addition, there is no indication regarding the calibration of the equipment, or that Claimant received a copy of the audiogram and report within 30 days of the test being administered.

Although Claimant's medical records contain numerous references to his hearing loss, the Court cannot disregard the requirement that Employer's application for Section 8(f) relief must comply with the regulations. The Court notes decisions of other administrative law judges which have supported this rule. See *Salcido v. Long Beach Container Terminal et al.*, 32 BRBS 431(ALJ) (1998) (ALJ found employer's audiograms not in compliance with 20 C.F.R. § 702.441 as the accompanying reports did not indicate reliability or if test was administered by a licensed audiologist); *Zervas, v. Southwest Marine Inc.*, 31 BRBS 12(ALJ) (1996) (denial of Special Fund relief based on Director's position that audiograms submitted as evidence of pre-existing condition were not in compliance with the regulations). In addition, Employer has not offered any argument or legal authority which refutes the Director's position. Based on the foregoing, Employer is not entitled to Section 8(f) relief.

Section 7(a)

Section 7(a) of the Act provides that an employer shall furnish such "medical, surgical and other attendance or treatment, hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). To assess medical expenses against an employer, the expenses must be reasonable and necessary. *Pernell v. Capital Hill Masonry*, 11 BRBS 532 (1979).

Claimant seeks reimbursement for hearing aids he purchased on August 16, 1999 upon the advice of his physician. Prior to acquiring these devices, Claimant submitted a letter to Employer requesting authorization for the purchase pursuant to Section 7 of the Act. CX-5, p.97. At trial, Dr. Schindler indicated that the cost of the hearing aids was reasonable and necessary to combat the effects of Claimant's hearing loss. Tr.58. He also conceded that with respect to the right ear, a hearing aid was not necessary because the infections had rendered this ear incapable of transmitting sound.

The Court finds the hearing aids to be "medical apparatus" for the purposes of Section 7(a), and further holds that such purchase was reasonable and necessary. Although Claimant's own expert admitted that it was futile to place a hearing device in the right ear, Claimant incurred this expense based upon the

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[36] Employer's reports did not include: (1) confirmation of Claimant's non-exposure to noise for the requisite period prior to the audiogram,(2) description of the testing standards used, and/or (3) explanation of the evaluating methods.

advice of his physicians. The record indicates that Employer received notification of the request for the hearing aids approximately six weeks before they were purchased. EX-5, p.97. Employer raised no objection at that time.

Based on the foregoing, Claimant is entitled to reimbursement for the purchase of two hearings aids from the Diles Hearing Aid Center in the amount of $2,400.00**.**

Section 14(e) Penalties and Interest

Claimant asserts that he is entitled to a penalty pursuant to section 14(e) based on Employer's failure to pay Claimant benefits or controvert Claimant's right to benefits after he filed his claim for compensation.

Failure to begin compensation payments or file a notice of controversion within twenty-eight days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to 10% of the overdue compensation. The first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. § 912(d), or after the employer has knowledge of the injury. 33 U.S.C. § 914(b); *Universal Terminal and Stevedoring Corp. v. Parker,* 587 F.2d 608 (3rd Cir. 1978). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. § 914(d); see also *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). The determination of whether an employer has knowledge of the injury is a question of fact and is assessed in the same manner as determining knowledge under Section 12(d). *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

In the instant case, Claimant's claim for compensation was filed on February 26, 1996. CX-6, p.99. Employer did not controvert the claim until November 1, 1996. EX-1, p.4. The undersigned finds that Employer did not file a timely notice of controversion and is liable for a 10% penalty in accordance with 14(e) of the Act for the unpaid installments from March 14, 1996 (14 days after February 26) until November 1, 1996 (date on which Employer filed its notice of controversion). 33 U.S.C. §§ 914(b), 914(d), 914(e).

Claimant further contends that he is entitled to interest on all unpaid installments of compensation. Although the Act does not explicitly provide for the payment of interest, it is an accepted practice to assess interest on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724

(1978). The appropriate rate of interest is the rate assessed by the United States District Courts pursuant to 28 U.S.C. § 1961. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984). Accordingly, the Court awards Claimant interest on all unpaid compensation, to be assessed beginning as of the date on which such payments were due and ending on the date of actual payment.

Conclusion

Claimant filed a timely Notice of Claim for Compensation pursuant to Sections 12 and 13 of the Act. Claimant has sustained a noise-induced hearing loss as a result of his employment with Employer since November 1991. This work-related injury in conjunction with Claimant's pre-existing hearing loss accounts for Claimant's current 79.3% binaural impairment. Under Section 8(c)(13), based upon a 79.3% hearing loss, Claimant is entitled to 158.6 weeks of compensation (200 weeks x 79.3 percent) at the rate of $782.44 per week. See 33 U.S.C. § 908(c)(13)(B).

In addition, Employer shall pay Claimant a 10% penalty for the unpaid installments during the period of March 14, 1996 through November 1, 1996, as well as interest on all compensation owed. See 33 U.S.C. § 914. Pursuant to Section 7(a), Employer shall also reimburse Claimant the sum of $2,400.00 for self-procured medical expenses. See 33 U.S.C. § 907(a). Employer is not entitled to Section 8(f) relief.

ORDER AND AWARD

1. Employer shall pay Claimant permanent partial disability for a 79.3% binaural hearing loss for 158.6 weeks at a weekly compensation rate of $782.44.

2. Employer shall reimburse Claimant the sum of $2,400.00 for self-procured medical expenses and shall provide all medical care that may in the future be reasonable and necessary for the treatment of noise-induced hearing loss. 33 U.S.C. § 907(a).

3. Employer shall further pay Claimant additional compensation in the amount of 10% on all compensation owed to Claimant but not paid to him from the fourteenth day after February 26, 1996 until November 1, 1996.

4. Employer shall pay interest on each unpaid installment of compensation at the rate specified in 28 U.S.C. § 1961, computed from the date that each payment was due until the date of actual payment.

5. The Special Fund is not liable for any portion of this award.

6. The District Director shall make all calculations necessary to carry out this Order.

7. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California